the one case in intended to avoid certain problems in the calculation of the countervailing charge. Those problems cannot, by definition, arise in the other case, so the two situations are not comparable.

3. Since the fixing of customs duties lies outside the common organization of the agricultural markets, it follows that it is not subject to the criteria and methods of calculation used for agricultural prices.

In Case 283/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Rheinland-Pfalz for a preliminary ruling in the proceedings pending before that court between

FIRMA A. RACKE, BINGEN,

and

HAUPTZOLLAMT MAINZ,

on the validity of Council Regulation (EEC) No 1167/76 of 17 May 1976 amending Annex IV to Regulation (EEC) No 816/70 laying down additional provisions for the common organization of the market in wine and the Common Customs Tariff as regards the exchange rates applicable to customs duties on certain wines (Official Journal 1976, L 135, p. 42), and on the validity of Article 2 of Council Regulation (EEC) No 2842/76 of 23 November 1976 amending Annex IV to Regulation (EEC) No 816/70 (Official Journal 1976, L 327, p. 2),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

In August and October 1976 Racke declared that a total of 217 507 litres of Tokay liqueur wine imported from non-member countries and falling under subheading 22.05 C III (b) 2 of the Common Customs Tariff had been withdrawn from its bonded warehouse and brought into free circulation in July and September 1976.

The responsible customs office, Hauptzollamt [Principal Customs Office] Mainz, converted the autonomous customs duty due on that wine, namely 12 units of account per hectolitre, into German marks in accordance with the version of General Rule C 3 of the Common Customs Tariff in force at the time, which stipulated that conversion into national currency should be effected by means of the par values communicated to and recognized by the International Monetary Fund.

However, Regulation No 1167/76, which came into force on 24 May 1976, provided that the duty on certain other wines falling within the same tariff heading as Tokay should be converted in accordance with the representative rate, that is to say the rate applied for the purposes of the common agricultural policy.

That rule was not extended to Tokay wine until the adoption of Council Regulation No 2842/76 on 23 November 1976. The customs duty calculated on the basis of General Rule C 3 came to DM 43.92 per hectolitre, whereas if the conversion had been carried out for the quantities imported by Racke on the basis of the representative rate duty would have been levied at DM 42.94 per hectolitre.

Racke brought an action before the Finanzgericht Rheinland-Pfalz [Finance Court, Rheinland-Palatinate] challenging the application of General Rule C 3 of the Common Customs Tariff for the purposes of converting the customs duties in question into national currency. It contended that:

(a) Insufficient reasons were stated in Regulation No 1167/76;

(b) Regulation No 1167/76 was incompatible with the second and third subparagraphs of Article 40 (3) of the EEC Treaty; and

(c) Since Regulation No 1167/76 was unlawful, Article 2 of Regulation No 2842/76 was also unlawful in so far as it did not make the latter regulation retroactive to the date on which Regulation No 1167/76 entered into force.

The Finanzgericht dismissed the contention that insufficient reasons were stated. However, with regard to the second contention, it queried whether the margin of discretion normally enjoyed by the Community institutions in implementing the common agricultural

policy would have been substantially reduced if it had been obvious from the outset that the application of two different exchange rates was bound to result in distortions of competition as between imported wines.

Consequently, by an order dated 24 November 1983, the Finanzgericht referred the following questions to the Court for a preliminary ruling:

"1. Does Council Regulation (EEC) No 1167/76 of 17 May 1976 (Official Journal 1976, L 135, p. 42) infringe the second and third subparagraphs of Article 40 (3) of the EEC Treaty, in so far as it excludes Tokay wines falling under subheading 22.05 C III (b) 2 of the Common Customs Tariff from the application of the representative exchange rate used for the conversion into national currencies (here, German marks) of the rate of customs duty expressed in units of account, and retains the arrangement under General Rule C 3 in Part I, Section I, of Regulation No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275)?

2. If so, what are the legal consequences thereof for the applicability of Article 2 of Regulation (EEC) No 2842/76 of 23 November 1976 (Official Journal 1976, L 327, p. 2)?

In particular, may the individual within the Community require that regulation to be applied retrospectively, with effect from the entry into force of Regulation (EEC) No 1167/76?"

The request for a preliminary ruling was lodged with the Court Registry on 20 December 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Racke, represented by Mr Nehm, Rechtsanwalt, of Ehle, Feldmann & Schiller, Cologne, by the Council of the European Communities, represented by Arthur Brautigam, a member of the Legal Department, acting as Agent, and by the Commission of the European Communities, represented by Jörn Sack, a member of the Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It further decided, under Article 95 (1) of the Rules of Procedure, to assign the case to the First Chamber.

II — The applicable legislation

Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234) makes provision for a countervailing charge to be levied if the duties laid down in the Common Customs Tariff are insufficient to afford Community wines protection *vis-à-vis* wines imported from outside the Community. Under the third subparagraph of Article 9 (3) of that regulation a decision may be taken not to levy all or part of the countervailing charge on imports of certain quality wines produced in non-member countries. Regulation (EEC) No 1019/70 of the Commission of 29 May 1970 on detailed rules for establishing free-at-frontier offer prices and fixing the countervailing charge in the wine sector (Official Journal, English Special Edition 1970 (I),

p. 294) made certain quality wines — among them Tokay — exempt from the countervailing charge. According to the sixth recital in the preamble to that regulation, the ground for the exemption was that the levying of a countervailing charge was not justified in view of the high price of the products concerned. Subsequently, Regulation (EEC) No 2506/75 of the Council of 29 September 1975 laying down special rules for the importation of products in the wine-growing sector originating in certain third countries (Official Journal 1975, L 256, p. 2) laid down rules governing the application of the reference price system to wines imported from certain non-member countries qualifying for tariff concessions. Under that regulation, if the offer price for such wines is below the free-at-frontier reference price, the tariff concession is to be withdrawn and a compensatory charge may be levied. That system gave rise to practical difficulties as regards the implementation of Regulation No 2506/75, since the representative rates were used to convert the reference prices fixed under Regulation No 816/70 into national currency in the various Member States, whilst the customs duty had to be converted on the basis of the par values stipulated in General Rule C 3 of the Common Customs Tariff.

In order to overcome the difficulties described above, the Council adopted Regulation No 1167/76 of 17 May 1976 amending Annex IV to Regulation No 816/70 (Official Journal 1976, L 135, p. 42). That regulation stated in the preamble that the same rules should be applied to the reference prices and customs duties when they are converted into national currencies. The annex to the regulation stipulated that the representative rate should be applied for the purpose of converting customs duties expressed in units of account in the case of all wines falling under tariff subheading 22.05 C with the exception of Port, Madeira, sherry, Tokay and Setubal muscatel.

The final stage was the adoption of Council Regulation (EEC) No 2842/76 of 23 November 1976 amending Annex IV to Regulation No 816/70 (Official Journal 1976, L 327, p. 2). That regulation extended the use of the representative rate to all the wines falling under tariff subheading 22.05 C, including quality liqueur wines.

III — Observations submitted by the parties

The first question

Racke contends that Regulation No 1167/76 infringes the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty on the ground that it deals with like situations differently; such difference in treatment has no objective justification and distorts competition appreciably.

Tokay is, in fact, in direct competition with other types of liqueur wine falling under subheading 22.05 C of the Common Customs Tariff, to which the

representative rate applies; Tokay and those other liqueur wines are viewed by the consumer as potential substitutes for one another. Although there is a difference in flavour between those wines they have the same function, since all the wines falling under subheading 22.05 C are invariably classed as aperitifs if dry and dessert wines if sweet.

Racke further considers that there is no objective reason for not applying the representative exchange rate to Tokay. The purpose of Regulation No 1167/76 was to avoid the technical difficulties that emerged with regard to the calculation of reference prices for the purposes of the common organization of the market in wine. However, in view of the fact that Regulation No 1019/70 took Tokay out of the ambit of the provisions governing the common organization of the market, the representative rate could have been applied to it without in any way jeopardizing the achievement of the objectives of Regulation No 1167/76.

There can be no reasonable doubt that the differences in the exchange rates applicable during the period in which Regulation No 1167/76 was in force distorted competition in a discriminatory manner to the detriment of Tokay. That view is borne out by the adoption of Regulation No 2842/76 less than six months after the entry into force of Regulation No 1167/76. In the fourth recital in the preamble to Regulation No 2842/76 the Council itself observed that "application of two different exchange rates in respect of wines falling within subheading 22.05 C of the Common Customs Tariff may lead to distortion in competition between imported wines" and that "this situation should be remedied as a matter of urgency". Consequently, the first question should be answered in the affirmative.

The *Council* argues, first, that no general principle of Community law obliges the Community invariably to put imports from non-member countries on an equal footing, for the benefit of Community importers. Although the second subparagraph of Article 40 (3) of the Treaty precludes any discrimination between producers or consumers within the Community, it must be borne in mind that importers do not fall directly within either of those two categories.

In any event, the prohibition of discrimination is contravened only where like situations are treated differently without any objective justification. Consequently, in the case in question, the first question to ask is whether all the wines falling within subheading 22.05 C are in a comparable situation as regards the application of the Common Customs Tariff. If so, the next question to ask is whether the difference in treatment resulting from Regulation No 1167/76 can be justified on objective grounds.

In the Council's view, it is doubtful whether it can be held that a comparable situation exists in this case. The products listed under subheading 22.05 C can be broken down into ordinary wines (subheading C I and C II) with an actual alcoholic strength of no more than 13° and 15° respectively, liqueur wines (C III and C IV) with an actual alcoholic strength of 15° to 22°, which are further subdivided into quality liqueur wines (Port, Madeira, sherry, Tokay and Setubal muscatel) and other liqueur wines, and lastly wines of an actual alcoholic strength exceeding 22° (C V). It is hard to imagine that the average consumer looks on ordinary wines or wines of over 22° as products with the same characteristics and properties as quality liqueur wines such as Port, sherry and Tokay.

Consequently, the argument must focus on liqueur wines, since they are products which consumers may look on as interchangeable. Yet even there, it is a question of imported liqueur wines which differ very much from one another in terms of quality and price and should therefore normally find different markets, so that they cannot, as a general rule, be in direct competition with one another to a substantial extent. On that basis, the Council contends that the products in question are not in comparable situations and hence there is no discrimination within the meaning of Community law.

In any event, the Council considers that the protective arrangements arising from the Common Customs Tariff and the basic regulation on the wine sector are not identical as regards imported quality liqueur wines, on the one hand, and other imported wines falling within subheading 22.05 C, on the other. Unlike all the other products falling within that subheading of the Common Customs Tariff, quality liqueur wines, such as Tokay, are not subject to the possible levying of a countervailing charge. More important still, the customs duty on quality liqueur wines is in every case lower than that on other liqueur wines.

The Council therefore contends that, owing to the objective differences within the provisions governing the importation of the products in question, there is an objective justification for the difference in treatment at issue. In that connection it should be borne in mind above all that the amendment made by Regulation No 1167/76 as regards the conversion of customs duties expressed in units of account was made solely because otherwise the reference price system would no longer have been capable of working properly with regard to certain wines imported from non-member countries granted tariff concessions. That was not the case as far as high-priced products, such as quality liqueur wines, were concerned, wines which are not subject to the possible levying of the countervailing charge.

The *Commission* observes that the first question consists of two parts which must be considered separately: firstly, does Regulation No 1167/76 infringe the principle of non-discrimination (second subparagraph of Article 40 (3)), and, secondly, is Regulation No 1167/76 compatible with a common price policy based on uniform methods of calculation (third subparagraph of Article 40 (3)).

As far as the first limb of the question is concerned, the Commission's observations do not differ substantially from the Council's. The Commission adds, among other things, that it is not possible to speak of discrimination when, as in this case, the difference between the two conversion rates is barely perceptible and the practical effect of the alleged discriminatory measure is minimal. Furthermore, the use of the "green rate" was more advantageous to importers only in countries with strong currencies. Even if the application of two different exchange rates did give rise to difficulties and, perhaps, to distortions of competition, it cannot be said that the result was to disadvantage imports of the wines in question in the Community. The impact of the measure was not invariably adverse for the parties affected and the application of the two rates cannot therefore be deemed to have been discriminatory in every case.

However, as regards the alleged infringement of the third subparagraph of

Article 40 (3), the Commission emphasizes that, like the other provisions of Article 40, that provision is concerned only with the specific machinery of the organizations of the agricultural markets. Accordingly, customs duties may be calculated and fixed on the basis of a fundamentally different method from that used for prices and taxes within the context of the common agricultural policy. Otherwise, the basic uniformity of the customs legislation would be impaired. In addition, the Commission considers that Article 40 does not preclude the possibility of divergences in respect of particular goods within a product group in so far as the divergences are justified on objective grounds. The Commission cites the different legal rules applicable to quality liqueur wines and other wines, to which reference has already been made in support of the argument that discrimination prohibited by the second subparagraph of Article 40 (3) is not present in this case.

The second question

Racke considers that it is unnecessary to answer the second question even if the first is answered in the affirmative. It considers that the invalidity of Regulation No 1167/76 suffices to entitle it to be treated as if that regulation had provided that the representative exchange rate should also apply to Tokay. If that view was incorrect it would have to be conceded that the applicant could not call for the representative rate to be applied if the Community legislature had not adopted Regulation No 2842/76.

If, none the less, an answer were to be given to that question, the matter would not in fact turn on whether an individual may call for the retroactive application of a regulation such as Regulation No 2842/76, but on whether Regulation No 2842/76 is void by virtue of the fact that it is not retroactive. Racke points out that, to attain its stated objective of remedying, as a matter of urgency, distortions of competition caused by Regulation No 1167/76, Regulation No 2842/76 should have been made retroactive to the date when Regulation No 1167/76 entered into force. In this case, considerations of legal certainty and legitimate expectations, which in principle preclude the retroactivity of a Community regulation, would not of course have impeded the retroactive application of the "green rate", since that would have restored the importers concerned to their original competitive position. It follows that Regulation No 2842/76 is also void for having infringed the prohibition of discrimination, inasmuch as the Council failed from the outset to fulfil its obligation to eliminate the distortions of competition introduced by Regulation No 1167/76.

The *Council* considers that, according to previous decisions of the Court, the material change in the legal situation of liqueur wines effected by Regulation No 2842/76 could not be retroactive unless it were clear from the wording of the regulation that the Community legislative authorities had intended it to be so; that was not the case.

Apart from that, the Council points out that it has not been established that it was obvious at the time when Regulation No 1167/76 was adopted that the application of two different exchange rates was bound to cause substantial actual distortions of competition in trade in the imported wines in question. For one thing, the difference between the application of the two rates as far as customs duty was concerned was minimal. For another, the products in

qustion were subject to different rates of customs duty, with a lower rate being applied precisely to quality wines, including Tokay. Lastly, the Council stresses that, since the risk of distortion of competition could only become apparent when Regulation No 1167/76 was applied in practice and was completely unforeseeable at the time when that regulation was adopted, it was unnecessary to make Regulation No 2842/76 retroactive.

The *Commission* also contends that there is no point in discussing the second question. None the less, it points out, purely in the alternative, that if the original version of Regulation No 1167/76 is invalid the competent authorities of the Community alone are empowered to rectify the resulting situation, and mere retroactive application of the green rate would not eliminate the existing distortions.

IV — Oral procedure

At the sitting on 21 June 1984, Racke, represented by Mr Nehm, the Council of the European Communities, represented by A. Brautigam, and the Commission of the European Communities, represented by J. Sack, presented oral argument.

The Advocate General delivered his opinion at the sitting on 27 September 1984.

Decision

1 By an order dated 24 November 1983, which was received at the Court Registry on 20 December 1983, the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatinate] referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the validity of Council Regulation No 1167/76 of 17 May 1976 (Official Journal 1976, L 135, p. 42) and on the possibility of giving retroactive effect to Council Regulation No 2842/76 of 23 November 1976 (Official Journal 1976, L 327, p. 2).

2 Those questions were raised in proceedings between Firma A. Racke, of Bingen, and the Hauptzollamt [Principal Customs Office] Mainz relating to the customs duty chargeable on imported Tokay liqueur wine falling under subheading 22.05 C III (b) 2 of the Common Customs Tariff.

3 In the proceedings before the Finanzgericht Racke contended that Regulation No 1167/76 was not valid in so far as it did not extend to Tokay the

rule for the conversion of customs duties into national currency on the basis of the representative rates, as stipulated for other wines falling within subheading 22.05 of the Common Customs Tariff.

4 As grounds for its decision to request a preliminary ruling, the Finanzgericht stated that it entertained doubts as to the existence of a margin of discretion on the part of the Community institutions in the event of its being obvious that the application of two different exchange rates was bound to result in distortions of competition.

The first question

5 The first question is worded as follows:

"Does Council Regulation (EEC) No 1167/76 of 17 May 1976 (Official Journal 1976, L 135, p. 42) infringe the second and third subparagraphs of Article 40 (3) of the EEC Treaty, in so far as it excludes Tokay wines falling under subheading 22.05 C III (b) 2 of the Common Customs Tariff from the application of the representative exchange rate used for the conversion into national currencies (here, German marks) of the rate of customs duty expressed in units of account, and retains the arrangement under General Rule C 3 in Part I, Section I, of Regulation (EEC) No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275)?"

6 The second subparagraph of Article 40 (3) of the EEC Treaty provides that the common organization of agricultural markets "shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Community". The third subparagraph of Article 40 (3) states that "Any common price policy shall be based on common criteria and uniform methods of calculation". Therefore, the question can be divided into two parts, one concerning the meaning of the second subparagraph of Article 40 (3), the other concerning the meaning of the third subparagraph of Article 40 (3).

7 As far as the first limb of the question is concerned, it is necessary to ascertain whether Tokay is in a comparable situation to those wines in respect of which customs duties expressed in units of account were converted into national currency at the representative rate, since, as the Court has consistently held, discrimination consists solely in the application of different rules to comparable situations or in the application of the same rule to

differing situations. In this case, it is a question of establishing whether the application of a different conversion rate for customs duties is justified by differing situations.

8 In this regard, it should be borne in mind that Article 9 (3) of Regulation (EEC) No 816/70 of the Council (Official Journal, English Special Edition 1970 (I), p. 234) provides for a countervailing charge to be levied on wines imported from non-member countries where their free-at-frontier offer price, plus customs duties, is lower than the reference price fixed for wine of Community origin. However, Regulation (EEC) No 1019/70 of the Commission of 29 May 1970 on detailed rules for establishing free-at-frontier offer prices and fixing the countervailing charge in the wine sector (Official Journal, English Special Edition 1970 (I), p. 294) provides, in Article 4 (4), that the countervailing charge is not to be levied on liqueur wines such as Port, Madeira, sherry, Tokay, Samos muscat and Setubal muscatel for which a certificate of origin is produced. As is clear from the sixth recital in the preamble to that regulation, it was considered that the price — normally very high — of the wines in question did not warrant the levying of a countervailing charge.

9 By Regulation No 2506/75 of 29 September 1975 (Official Journal 1975, L 256, p. 2) the Council stipulated that the expression "free-at-frontier reference price" means the Community reference price less customs duties actually levied. However, as far as wines subject to the countervailing charge were concerned, that definition gave rise to problems in connection with the calculation of the charge, since the Community reference price was converted into national currency, pursuant to Council Regulation No 475/75 of 28 February 1975 (Official Journal 1975, L 52, p. 28), on the basis of the representative exchange rate while the customs duty was converted on the basis of the par value. There was therefore an obvious risk of distortions being caused by calculations carried out using non-uniform criteria. To avoid that risk, Regulation No 1167/76 provided that the customs duty should also be converted on the basis of the representative rate.

10 In contrast, no such problem arose for wines which were not subject to the countervailing charge, and hence no comparison between the two situations appears to be justified.

11 It is clear from the foregoing that the application of different rules to the two situations described above does not result in a breach of the principle of non-discrimination.

12 Consequently, the answer to the first limb of the question must be that consideration of the matters raised has disclosed no factor of such a kind as to suggest that Regulation No 1167/76 is contrary to the second subparagraph of Article 40 (3) of Treaty.

13 As regards the second limb of the question, it must be emphasized that the first subparagraph of Article 40 (3) refers expressly to the "measures required", connection with the common organization of the markets, "to attain the objectives set out in Article 39". Those measures include, in the first place, regulation of prices. It followes that the "common price policy" mentioned in the third subparagraph of Article 40 (3) can only relate to the common organization of the agricultural markets. Since the fixing of customs duties lies outside that sphere, it follows that it is not subject to the criteria and methods of calculation used for agricultural prices.

14 In the light of the foregoing, it is clear that Regulation No 1167/76 is not incompatible with the third subparagraph of Article 40 (3) of the ECC Treaty either.

15 The conclusion must therefore be that consideration of the matters raised has disclosed no factor of such a kind as to affect the validity of Regulation No 1167/76.

The second question

16 In view of the fact that the second question was only raised in case the first question should be answered in the affirmative, it does not need to be answered.

Costs

The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz, by order of 24 November 1983, hereby rules:

Consideration of the matters raised has disclosed no factor of such a kind as to affect the validity of Regulation No 1167/76.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 13 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

G. Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 27 SEPTEMBER 1984 [1]

Mr President,
Members of the Court,

The Finanzgericht Rheinland-Pfalz (Third Senate) has requested a preliminary ruling on two questions which concern the complicated import system under the common organization of the wine market and the associated exchange-rate problems. In order to ensure a proper understanding of the facts, I shall devote the first part of my opinion to the applicable legislation.

1 — Translated fromt the Dutch.